IN THE

Supreme Court of the United States

No. 70-5030

MARGARET PAPACHRISTOU, ET AL.,

Petitioners,

v.

CITY OF JACKSONVILLE

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

PETITIONERS' BRIEF

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OPINIONS BELOW

The order of conviction entered by the Jacksonville Municipal Court and the order of the Circuit Court for the Fourth Judicial Circuit of Florida affirming the convictions are unreported. The opinion of the District Court of Appeal, First District of Florida, is reported as *Brown v. City of Jacksonville,* 236 So.2d 141 (1st Dist. Fla. 1970).

JURISDICTION

The statutory authority for this court's jurisdiction is 28 U.S.C. 1257(3).

The judgment of the District Court of Appeal, First District of Florida was entered on June 9, 1970, and became final on June 29, 1970. By an order of Mr. Justice Black, entered on September 10, 1970, the time for filing this petition was extended to October 6, 1970.

QUESTION PRESENTED

Are the City of Jacksonville Vagrancy Ordinance and Florida Vagrancy Statute constitutional?

ORDINANCES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners were convicted under Jacksonville Ordinance Code §26-57 (1965)[1] providing that:

> "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and,

[1] The Jacksonville vagrancy ordinance was recently renumbered to §330.107. It was also modernized by eliminating "juggling." The current ordinance is otherwise identical to the one under which petitioners were convicted.

upon conviction in the Municipal Court shall be punished as provided for Class D offenses."[2]

The Florida vagrancy statute (Florida Statutes § 856.02), also affects petitioners because of an assimilative crimes ordinance (Jacksonville Ordinance Code § 27-43), making the commission of any Florida misdemeanor a Class D offense against the City of Jacksonville.

> "Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives or minor children, and all able-bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants, and upon conviction, shall be subject to the penalty provided in § 856.03."[3]

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[2]Class D offenses, when petitioners were convicted, were punishable by 90 days imprisonment, $500 fine, or both. Jacksonville Ordinance Code § 1-8 (1965). The maximum punishment has since been reduced to 75 days or $450 to avoid Federal right-to-counsel decisions. Jacksonville Ordinance Code 304.101 (1971).

[3]In its 1971 session, the Florida legislature eliminated the words "or tippling shops" from the statute. This was part of a new Comprehensive Alcoholism Prevention, Control and Treatment Act. (Chap. 71-132, 1971 Regular Session). The phrase "common drunkards" was inexplicably left untouched.

The following portions of the United States Constitution are relied upon:

Article I, § 8, Cl. 3:

> The Congress shall have the power to . . . regulate Commerce among the several States. . . .

Article IV, § 2, Cl. 1:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment 5:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Amendment 8:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners were all convicted of vagrancy in the Jacksonville Municipal Court.

There were five separate cases at the Municipal Court level—later consolidated on appeal. The separate cases were:

1. City of Jacksonville v. Margaret Papachristou, Betty Jean Calloway, Eugene E. Melton, and Leonard Johnson.
2. City of Jacksonville v. Jimmy Lee Smith.
3. City of Jacksonville v. Thomas Owen Campbell.
4. City of Jacksonville v. Henry Edward Heath.
5. City of Jacksonville v. Hugh Brown.

STATEMENT OF FACTS

The parties have stipulated to the following statement of facts for each separate case. The stipulated statements are based on stenographic transcripts of the Municipal Court trials. The transcripts are not reproduced in the Single Appendix but are included in the Record on file with the Clerk of this Court.

City of Jacksonville v. Margaret Papachristou, Betty Jean Calloway, Eugene E. Melton and Leonard Johnson

Papachristou, Calloway, Melton and Johnson were charged on April 20, 1969, with "vagrancy—prowling by auto." Papachristou and Calloway are white females; Melton and Johnson are negro males. (App. 10, 12, 14, 16)

Papachristou was a 23-year old enrollee in a job training program sponsored by the Florida State Employment Service at the Florida Junior College in Jacksonville. She was living with her parents while separated from her husband. (Papachristou Tr. 53-56).

Calloway was a 22-year old typing and shorthand teacher at the Northeast State Hospital (a State mental institution) in Macclenny, Florida, a small town outside Jacksonville, in which she had lived her whole life. She was the owner of the automobile in which the four defendants were arrested. (Papachristou Tr. 56-59).

Melton was a 24-year old Vietnam war veteran who had several months before been released from the Navy after nine months in a Veterans Administration Hospital recovering from Vietnam war wounds. On the date of his arrest, he was supporting himself as a parttime computer helper while attending college as a fulltime student at a college in Jacksonville. (Papachristou Tr. 40-62).

Johnson was a 24-year old tow-motor operator in a grocery chain warehouse. He was a lifelong resident of Jacksonville. In fact, while he was being arrested as a vagrant, some members of his family who had been passing by attempted unsuccessfully to vouch for him. (Papachristou Tr. 46-52).

Calloway, Melton and Johnson had never been previously arrested. Papachristou had once before been convicted of a municipal offense.

At the time of their arrest, the defendants were all riding in Calloway's car on a main thoroughfare in Jacksonville. They had gone to a restaurant, owned by Johnson's uncle, for something to eat and were on their way to a nightclub. (Papachristou Tr. 20-27, 40-61).

The arresting officers denied that the racial mixture of the defendants played any part in the decision to arrest them. The officers said they arrested the defendants because the defendants had been seen stopped near a used car lot which had been broken into several times. The officers admitted, however, that they had made no effort to find out if any breaking and entering had occurred on the night in question, had had no reports of any breaking and entering on the night in question, had advised no detectives or other investigative officers of the arrest of the defendants,

and had made no effort to drop the vagrancy charges and release the defendants when no evidence of any theft or other illegality materialized. (Papachristou Tr. 36-39).

After arrest, bail was set for the defendants at the maximum amount allowable under the Police Department bail schedule. Further, an unidentified caller from the Police Department telephoned Papachristou's parents that she had been out with a negro. Melton, who had given his unlisted telephone number to the booking officer, also began receiving threatening telephone calls. (Papachristou Tr. 53-62).

All four of the defendants were found to be vagrants and were sentenced to ten days in jail. The sentences for Calloway, Melton and Johnson were suspended because they had never before been arrested. Papachristou was ordered to serve her sentence because of her previous Municipal Court conviction. (Papachristou Tr. 65-72). (App. 11, 13, 15, 17).

City of Jacksonville v. Jimmy Lee Smith

Jimmy Lee Smith and a codefendant, Milton Henry, were charged in the Jacksonville Municipal Court with "vagrancy —vagabonds." (App. 5).

Smith was a 23 year old parttime produce worker and parttime organizer for a negro political organization. He had a common law wife and three children who were supported by him and his wife. He had previously been arrested several times, but had been convicted only once, in 1961. (Smith Tr. 17-24).

Smith's codefendant was an 18 year old high school student with no previous record of arrest. (Smith Tr. 8-16).

Smith and his codefendant were arrested between 9:00 and 10:00 A.M. on a weekday morning in a downtown Jacksonville business area. They were at the time waiting for a friend who was to lend them a car so that they could go apply for jobs reportedly available at a produce company. (Smith Tr. 10-21).

Because it was cold and Smith had no jacket, they went at one point to a dry cleaning shop to wait, but left when

requested to do so. They thereafter traveled back and forth two or three times over a two-block stretch looking for their friend. (Smith Tr. 14-20).

After approximately ten to twenty minutes, two police officers arrived, apparently summoned by store-owners who were wary of Smith and his companion. (Smith Tr. 14-20).

Smith and his codefendant made no attempt to avoid the officers and explained their situation to them. The officers searched both subjects and found that neither had a weapon. Both Smith and his companion were nonetheless arrested because they had no identification and because "their story just didn't seem to work from what we could see." (Smith Tr. 6-10, 30).

Because Smith's codefendant had no previous arrest record, he was acquitted.

Smith, however, was administered a tongue lashing about his character, his "open adultery," his "bastard children," his arrests, and his general demeanor. The judge concluded with the announcement that "you are not what we call a good citizen, a respectable citizen." He then sentenced Smith to 30 days imprisonment but suspended the prison sentence with the admonition that Smith would go to jail ". . . if they pick you up for this again and you are convicted. . .". (Smith Tr. 25-36). (App.

City of Jacksonville v. Henry Edward Heath

On March 18, 1969, at approximately 8:00 P.M., Heath and a codefendant were arrested for "vagrancy—loitering" and "vagrancy—common thief." (App. 6).

Heath was a lifelong resident of Jacksonville and was employed at a local automobile body shop. Heath's codefendant was also a self-supporting Jacksonville resident. Heath had previously been arrested, but his codefendant had no arrest record. (Heath Tr. 19-22, 24).

Heath and the codefendant were arrested when they drove up to a residence shared by Heath's girlfriend and some other girls. When Heath and the codefendant arrived

(in the codefendant's car), some police officers were at the premises in the process of arresting another man. (Heath Tr. 24-27).

When Heath and his codefendant started backing out of the driveway, the officers signaled to them to remain. Both men were then required to get out of the car, whereupon they were searched and the automobile was searched. (Heath Tr. 4-27).

Although no contraband or incriminating matter was found, both men were placed under arrest for vagrancy as aforesaid. The charge "vagrancy—common thief" was selected for Heath because he was reputed to be a thief. The charge "vagrancy—loitering" was placed against the codefendant because of his standing around the driveway, which the officers admitted was done only at their command. (Heath Tr. 4-27).

Heath's codefendant was acquitted.

Heath was found guilty and was sentenced to ten days imprisonment. (App. 7)

City of Jacksonville v. Thomas Owen Campbell

Campbell was arrested as he approached his home on April 18, 1969, very early in the morning. He was charged with "vagrancy—common thief." (App. 8).

The arresting officer testified that he stopped Campbell because Campbell was traveling at a high rate of speed. He placed no speeding charge against Campbell, however. The officer first said that he was in the vicinity observing traffic, even though the arrest took place at 2:30 A.M. in a residential neighborhood. The officer then admitted that his presence in the vicinity was because Campbell lived there. (Campbell Tr. 4-8).

Campbell was found guilty and was given a 10-day suspended sentence. (App. 9)

City of Jacksonville v. Hugh Brown

Brown was arrested on January 29, 1969, for "vagrancy–disorderly loitering on street" and "disorderly conduct–resisting arrest with violence." (App. 3).

Shortly before midnight, Brown was observed leaving the Richmond Hotel, a small downtown hotel, by a Jacksonville police officer. The police testified that Brown was reported to be a thief, narcotics pusher, and generally opprobrious character. The officer, who was seated in a police cruiser with another officer, called for Brown to come over to him. He said that he was suspicious of Brown because of the general combination of Brown's reputation, the way Brown was walking, the appearance of something resembling money in Brown's hand, and the high crime rate of the locale. He called Brown over to search him and check him out generally, intending at the time to arrest him unless he had a good explanation for being on the street. (Brown Tr. 7-20).

When Brown came over to the police car as commanded by the officer, the officer began to search him, apparently preparatory to placing him in the car. In the course of the search, he came upon two small packets, later found to contain heroin. When the officer touched the pocket where the packets were, Brown began to resist violently. (Brown Tr. 7-20).

The arresting officer and his partner testified that they did not know how long Brown had been a resident of Jacksonville, did not know whether he had a family, did not know whether he had any residence, and did not know whether he had any employment. (Brown Tr. 22-29).

Brown was convicted on both charges, being sentenced to 30 days imprisonment on the vagrancy charges and 60 days on the resisting arrest charge. (App. 4).

STATEMENT OF PROCEDURES BELOW

The Municipal Court charge against petitioners was stated only on the police department docket sheet made up when they were booked into the jail. (App. 3, 5, 6, 8, 10, 12, 14, 16). Under Florida law, no indictment, information, affidavit, or formal charging instrument is required in municipal courts. *Wright v. North*, 91 So. 87 (Fla. 1922); *Trujillo v. State*, 187 So.2d 390 (3rd Dist. Fla. 1966).

Use of the term "vagrancy" as the opening entry in the charging portion of the docket sheet meant that petitioners were charged simply with "vagrancy" and stood liable to conviction under any part of the city ordinance or state statute.

The explanatory words appearing after "vagrancy" on each docket sheet did not qualify the general vagrancy charge. They were added under a police department practice of noting what persons arrested for such offenses as vagrancy and disorderly conduct were doing or being when arrested. The explanatory words were not intended to isolate some part of the ordinance or statute as the basis for the charge. For example, the four defendants in the Papachristou case were accused of "vagrancy—prowling by auto" on the docket sheet. (App. 10, 12, 14, 16) The words "prowling by auto" refer to no specific part of the ordinance or statute and are technically surplusage. The defendants were charged—and convicted—under the entire ordinance or statute.

Presumably the city authorities felt they were proceeding on their own ordinance rather than the state statute. The parties proceeded on that assumption in the appellate stages below. The state statute is treated in this brief only because of its theoretical availability. In any event, the ordinance and statute are almost identical.

The Municipal Court convictions were affirmed by the Circuit Court for the Fourth Judicial Circuit of Florida. (App. 19). Petitioners then applied to the District Court

of Appeal, First District of Florida, for a writ of certiorari (App. 20, 23), which was denied. (App. 39, 42). Both the Circuit Court and District Court of Appeal felt that the constitutionality of the Jacksonville ordinance was controlled by the Florida Supreme Court's decision in *Johnson v. State*, 216 So.2d 7 (Fla: 1968), upholding the state statute.

SUMMARY OF ARGUMENT

Several constitutional principles are violated by the instant legislation.

IMPROPER EXERCISE OF POLICE POWER

The legislation is an improper exercise of police power which is not required in the public interest, is not necessary for its purported purposes, and is unduly oppressive on individuals.

This legislation is patterned after old English *malum prohibitum* socio-economic legislation tailored to the peculiar needs of feudal and Elizabethan England. It consequently criminalizes people for things that are totally non-criminal by modern standards—i.e., nightwalking, loafing, and living on the earnings of their wives or children. In this respect it seriously jeopardizes the zone of privacy secured by *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The status proscriptions of the legislation in effect create presumptions of criminality based upon the supposed propensity of certain persons to commit crimes. These presumptions are not sufficiently grounded in logic and rationality for criminal penalties to be based upon them. More grievous, the proscriptions subject persons to unlimited, continuing liability to punishment, unconditioned by the quality or frequency of past acts, past punishment, or likelihood of future violations.

The wrong in the legislation is compounded by the availability of far less drastic means for achieving the same purpose.

VOID FOR VAGUENESS

Lack of Notice

The legislation is incredibly vague and provides no notice of the conduct sought to be prohibited. It is far more vague than the anti-gang statute (a kind of modern vagrancy law) struck down in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Lack of Enforcement Standards

A total lack of enforcement standards leaves complete enforcement discretion in the hands of enforcing officers, whether policemen, prosecutors, municipal judges, or juries. The dangers of this are magnified because the legislation is directed at the unpopular, unconventional, and unestablished.

Lack of Breathing Space

The vagueness of the legislation inhibits people in the exercise of sensitive, preferred rights.

USE FOR ARREST AND DETENTION ON SUSPICION ALONE

Ingrained in vagrancy is a tradition of use as a makeweight for arrest and detention on suspicion alone. The basic premise of the legislation is that some people are *per se* suspicious, and the way the legislation is used is the natural and logical result of that built-in premise.

This history of use for "suspicion only" is abundantly documented and provable. It so permeates the legislation that it must be regarded as an integral part of it which renders it facially unconstitutional.

ADDITIONAL RIGHTS AND IMMUNITIES

Vagrancy is objectionable on a number of other constitutional grounds not presented as squarely here as those above. These additional objections are simply stated to demonstrate the total inimicability of vagrancy to current standards. The other objections are: (1) denial of equal protection, (2) cruel and unusual punishment or unjust punishment in violation of due process, (3) involuntary servitude, (4) abridgement of the privilege against self incrimination, (5) infringement of the right of travel and movement and (6) double jeopardy.

ARGUMENT

The Jacksonville and Florida vagrancy laws are archaic vestiges of long-past economic conditions and social philosophies. Whatever justification vagrancy laws may once have had, the instant legislation is invalid under several constitutional principles.[4]

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[4]The instant legislation was held constitutionally invalid by a three judge panel in *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969). Other decisions holding similar legislation unconstitutional are: *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968); *Scott v. District Attorney, Jefferson Parish*, 309 F. Supp. (E.D. La. 1970); *Wheeler v. Goodman*, 298 F. Supp. 935 (W.D. N.C. 1969); *Broughton v. Brewer*, 298 F. Supp. 260 (S.D. Ala. 1969); *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969); *Smith v. Hill*, 285 F. Supp. 556 (E.D. N.C. 1968); *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968); *Baker v. Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967); *United States v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966); *Balizer v. Shaver*, 481 P.2d 700 (N.M. Ct. App. 1971); *State v. Grahovic*, 480 P.2d 148 (Hawaii 1971); *Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970); *City of Reno v. Second Judicial District Court*, 427 P.2d 4 (Nev. 1967); *Alegata v. Commonwealth*, 231 N.E.2d 201 (Mass. 1967); *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. 1967). See also *United States v. Kilgen*, 431 F.2d 627 (5th Cir. 1970); *Jones v. Peyton*, 411 F.2d 857 (4th Cir. 1969); *Territory of Hawaii v. Andula*, 48 F.2d 171 (9th Cir. 1931).

Numerous commentators have also concluded that vagrancy legislation is unconstitutional. Especially helpful are: Amsterdam, *Federal*

IMPROPER EXERCISE OF POLICE POWER

The most grievous fault of the instant legislation is that it imposes criminal penalties upon status and conduct which are not criminal and have no rational relationship to criminality. The legislation, therefore, exceeds the state's police power.

"The term 'police power' denotes the time-tested conceptional limit of public encroachment upon private interests." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). An exercise of police power must be reasonable. This Court ruled in *Goldblatt*:

> "The classic statement of the rule in *Lawton v. Steele*, 152 U.S. 133 (1894) is still valid today: 'To justify the State . . . in interposing its authority in behalf of the public, it must appear, first, that the interest of the public . . . requires such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" 369 U.S. at 594.

The first evidence of the instant legislation's current inappropriateness is its derivation. Both the Jacksonville ordinance and Florida statute are products of the peculiar social needs of feudal and Elizabethan England.

Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. Rev. 102 (1962). Others are: McClure, *Vagrants, Criminals and the Constitution*, 40 Denver L. Center J. 314 (1963); Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960); Sherry, *Vagrants, Rogues and Vagabonds–Old Concepts in Need of Revision*, 48 Calif. L. Rev. 557 (1960); Foote, *Vagrancy-type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203 (1953); Note, *Vagrancy–A Study in Constitutional Obsolescence*, 22 U. Fla. L. Rev. 384 (1970); Note, *Constitutional Attacks on Vagrancy Laws*, 20 Stanford L. Rev. 782 (1968); Note, *Vagrancy and Related Offenses*, 4 Harv. Civ. Lib.-Civ. Rights L. Rev. 141 (1966).

In feudal England, the serf was bound to his manor, with no right of migration.[5] With the breakdown of feudalism and the disintegration of the social forces which had held the working populace to a specific locale, the former serfs began to drift to other places and into other ways of life. The resultant labor shortages and economic pressures were intensified by the Black Plague. The governing forces responded immediately with the Statutes of Labourers, designed to guarantee laborers in each part of the country and to prevent any rise in wages or the price of goods by fixing maximum limits on wages and prohibiting the movement of workers from their area of residence for a better livelihood.[6]

Additional legislation followed shortly, dealing more broadly with: (1) restriction of the able bodied to their own parish and the regulation of their labor, (2) provision for and stabilization of local systems for the relief of impotent poor unable to work, and (3) punishment for the able bodied who would not work.[7] Illustrative is an act passed in 1414 (2 Hen. V, c. 4) providing that runaway servants and laborers who fled "to the great damage of gentlemen and others to whom they should serve" could be given summary hearings and be sent back to their original homes.

Beginning in the middle 16th Century, vagrancy legislation took on another dimension. The combination of increases in population and the withering away of old institutions created a large class of unemployed drifters. Black-

[5]Coulton, *Medieval Panorama* (The Noon Day Press, New York, 1955), p. 76.

[6]23 Edw. III, c. 1 (1349); 25 Edw. III, c. 1 (1350). See in addition 25 Edw. III, c. 7 (1350). See III Stephen, *History of the Criminal Law of England*, pp. 267, 274 (MacMillan and Co., London, 1883); Coulton, *Medieval Panorama*, p. 82 (Noon Day Press, New York, 1955); Turner (Editor), *Kenney's Outlines of the Criminal Law*, p. 28 (Cambridge University Press, 18th Edition 1962).

[7]1 Rich. II, c. 6 (1377); 2 Rich. II, c. 6 (1378); 7 Rich. II, c. 5 (1383); 12 Rich. II, c. 3 (1388). See *Ledwith v. Roberts*, 1 K.B. 232, 271-274 (1937); III Stephen, *supra*, pp. 268-272; Coulton, *supra*, p. 82.

stone described these people as "such as wake on the night and sleep on the day, and haunt customable taverns and ale houses, and routs abouts, and no man wot from whence they came and whither they go,". IV Blackstone, *Commentaries*, Chap. XIII *169. This evolution was summarized in *Ledwith v. Roberts*, 1 K.B. 232, 271 (1937):

> "The early Vagrancy Acts came into being under peculiar conditions utterly different from those of the present time. From the time of the Black Death in the middle of the 14th Century till the middle of the 17th Century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th Century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages, the breakup of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of 'public assistance' in the form of lodgings, food, and alms, and lastly, the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the 'wild rogues' so common in Elizabethan times and literature, who had been born to a life of idleness and had no intention of following any other. It was they and their conferderates who formed themselves into the notorious 'brotherhood of beggars' which flourished in the 16th and 17th Centuries."

The result was a 16th Century series of acts designed to reach all categories of "rogues and vagabonds" and to provide the means for suppressing them.[8] The premise for

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[8]See, e.g., 19 Hen. VII, c. 12 (1503); 22 Hen. VIII, c. 12 (1530); 27 Hen. VIII, c. 25 (1535); 1 Ed. VI, c. 3 (1547). Extremely harsh

these was stated in the preamble of the Slavery Act of 1547:

> "Idlesnes and Vagabundrye is the mother and roote of all theftes robberyes and all evill actes and other mischiefs . . ." 1 Ed. VI, c. 3 (1547)

The culmination of this broadening of the legislation to meet 16th Century exigencies, was the Statute of Elizabeth in 1597. 39 Eliz. I, c. 4 (1597).

This history is significant because the Jacksonville and Florida vagrancy legislation is strikingly similar to the Statute of Elizabeth. One author has pointed out that the Florida statute "seems to have been selected at random from the provisions of the Statute of Elizabeth as it was enacted in 1597." Sherry, "*Vagrants, Rogues and Vagabonds–Old Concepts in Need of Revision,*" 48 Calif. L. Rev. 557, 560 (1960). This in effect means that the Jacksonville and Florida laws are copied from *malum prohibitum* legislation tailored for the socio-economic needs of the 16th Century. While not conclusive, this feudal and Elizabethan derivation creates a virtual presumption of unsuitability to mid-20th Century conditions.

Measured by current standards, the interference caused by many portions of the instant legislation is manifestly not required in the interest of the public, is not reasonably necessary for the accomplishment of the purpose, and is unduly oppressive upon individuals. Widely approved pursuits–indulged by most, if not all–run afoul of the prohibitions against "night walkers," "habitual loafers," or "wandering or strolling . . . from place to place . . .". Prosecution of "persons neglecting all lawful business and habitually spending their time by frequenting . . . places where alco-

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penalties were provided. The ears of certain offenders could be notched or cut off, and multiple offenders could ultimately be branded or executed. Under the Slavery Act of 1547 (1 Ed. VI, c. 3) all loitering and idle wanderers who would not work would be taken for vagabonds and thereafter be branded, be made slaves, be forced to wear a ring of iron around their necks and limbs and be compelled to work by beating, chaining, or otherwise.

holic beverages are sold or served" would no doubt greatly jeopardize the membership of most country clubs. Having regard for the distribution of wealth in today's economy, it would greatly surprise many citizens who consider themselves lawabiding to learn that being supported by their wives or children is a criminal offense. Totally mind-boggling is the notion that people who are without "reasonably continuous employment or regular income and who have not sufficient properties to sustain them and misspend what they earn . . ." are criminals. The criminalization of these people, and countless others who could be similarly included, seriously threatens the zone of privacy sought to be preserved by this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). If, in some way, the public interest is served by such interference, criminal punishment is unduly oppressive and not reasonably necessary as a corrective.

Other portions of the instant legislation fall in a different category. The State clearly has a valid right to interfere with gamblers, thieves, pilferers, pickpockets, traders in stolen property, and even beggars, drunkards, railers, and brawlers. Certainly it would be within the State's province to punish specific instances of these activities. But regulation of these activities by blanket status proscriptions is not a valid exercise of police power.

Even in these areas of legitimate interest, vagrancy is no more than a conclusive presumption of criminality based on a supposed propensity for crime. By analogy to the line of cases represented by *Leary v. United States*, 396 U.S. 6 (1969), the instant legislation should be struck down unless Jacksonville and Florida can demonstrate a rational basis for it. The published analyses tend to negate a rational realtions. See Note, *Vagrancy Concepts Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. Rev. 102, 116, 125 (1962); Foote, *Vagrancy—Type, Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956).

A more fundamental objection is the completeness of the legislation's coverage, both in breadth and duration, and the

harshness that results. An individual can, for example, become a "thief," for purposes of the legislation, by proof of conviction of some kind of theft. *Rodriguez v. Culbreath*, 69 So.2d 58 (Fla. 1953) (a gambling case). By operation of the instant laws, he then becomes permanently subject to incarceration, since vagrancy is a continuing offense. It makes no difference that his theft—or two or three thefts, for that matter—may have been minor and that he may have been punished under the laws dealing specifically with acts of theft. Stated another way, the vagrancy laws would subject him to punishment because of a continuing status conferred by past, noncontinuing—perhaps repented—acts. This is possible because the instant laws flatly proscribe status, unqualified by limitations based on such factors as frequency or quality of past acts, past punishment, or the likelihood of future violations.

The unreasonableness of the instant laws is compounded by the availability of other means for accomplishing crime control. Florida and its municipalities are amply armed with laws against specific acts of thievery, gambling, etc. A new Comprehensive Alcoholism Prevention, Control and Treatment Act is available for alcoholism. Chapter 71-132, 1971 Regular Session, Florida Legislature. Law enforcement officers have, in addition to this Court's decision in *Terry v. Ohio*, 292 U.S. 1 (1968), a stop-and-frisk law for temporary street detentions. § 901.151 Florida Statutes (1969). There is also a multiple offenders act, although considerably more circumscribed than the vagrancy laws. § 775.084 Florida Statutes (1971). The availability of these alternate methods is relevant under this Court's ruling in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) that:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Whatever small, otherwise unavailable, benefit is attained by the vagrancy laws is offset by their harmful effects. As stated by the Task Force on Administration of Justice of the President's Commission on Law Enforcement and Administration of Justice:

> "The high price paid for extending to the police wide and largely uncontrollable power of traditional disorderly conduct and vagrancy laws should be recognized."[9]

One of the first actions taken by a newly formed Jacksonville Community Relations Commission, created to alleviate urban tensions, was to seek a discontinuance by local police of use of the vagrancy laws.[10]

VOID FOR VAGUENESS

"The first essential of due process of law" is violated by "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Reasonable definiteness is needed to satisfy three fundamentally important social concerns: (1) to provide fair notice to affected persons, (2) to provide ascertainable and delimited standards of enforcement for the prevention of arbitrary, discriminatory, standardless use, and (3) to secure a "breathing space" for constitutional liberties, especially the preferred guarantees of the Bill of Rights.[11] These policies apply to the instant legislation as follows:

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[9] *The Courts*, Report of the Task Force on Administration of Justice, the President's Commission on Law Enforcement and Administration of Justice, p. 104 (U.S. Government Printing Office 1967).

[10] Minutes of Special Meeting, Community Relations Commission of the City of Jacksonville, April 23, 1969.

[11] This breakdown of the policies embodied in the void-for-vagueness rule follows the analysis of Professor Anthony Amsterdam in *Federal Constitutional Restrictions on the Punishment of Crimes of*

Lack of Notice

A criminal statute must give reasonable notice of the conduct sought to be prohibited. This Court said in *United States v. Harriss*, 347 U.S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

See also, *Palmer v. Euclid*, ___ U.S. ___ (No. 143 decided May 24, 1971); *Bouie v. Columbia*, 378 U.S. 347 (1964); and *Wright v. Georgia*, 373 U.S. 284 (1963).

That the instant legislation fails to give reasonable notice to affected persons is too obvious to require extended analysis or argument. Such terms as "dissolute," "lewd," "wanton and lascivious," "disorderly," "habitually," "frequenting," and "misspend" defy definiteness. Equally difficult to pin down are the terms "rogues," "common railers and brawlers," "persons wandering or strolling around from place to place without any lawful purpose or object," "habitual loafers," "disorderly persons," and "persons neglecting all lawful business." Even such apparently recognizable categories as "vagabonds," "common drunkards," "thieves, pilferers or pickpockets," "common gamblers," and "traders in stolen property" are under closer scrutiny incapable of ascertainment in the absence of any definition or guideline.

Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like, 3 Crim. L. Bull. 205 (1967). Professor Amsterdam there uses vagrancy for demonstration of a general approach developed more fully in Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960), which was noted with approval by this Court in *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

The lack of notice in vagrancy legislation was expressly cited by Mr. Justice Frankfurter in *Winters v. New York*, 333 U.S. 507, 540 (1948) (dissenting opinion):

> "These statutes are in a class by themselves in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statutes or by the subject matter so as to give notice of conduct to be avoided."

In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), a New Jersey "anti-gang" statute, a kind of modern vagrancy statute, was struck down for failure to give affected persons adequate notice of any ascertainable standard of conduct. The vagueness of the instant legislation, of course, far exceeds that in *Lanzetta*.

While a facially vague statute may sometimes be saved by confinement to a narrow subject matter which imparts specificity and provides a point of reference (see e.g., *United States v. National Dairy Prods. Co.*, 372 U.S. 29 (1963)), or by a strong scienter requirement, which prevents inadvertent transgression (see e.g., *Screws v. United States*, 325 U.S. 91 (1945)), there is no such saving factor here. On the contrary, the social setting of the legislation makes interpretation of it more difficult.

Lack of Enforcement Standards

The instant legislation is as devoid of enforcement standards as of notice. Absolute discretion is vested in the enforcing officers, whether policeman, prosecutor, municipal judge, or jury. The right of the enforcing officers to set their own standards and pick their own targets is implied in the legislation, since stringent enforcement against all

who might come within its ambit would lead eventually to the arrest of everyone. An express selective enforcement gloss was put on the Florida statute by the Florida Supreme Court in *Headley v. Selkowitz*, 171 So.2d 368 (Fla. 1968).

The danger of oppression and harassment in standardless legislation is especially acute when, as here, the legislation is directed at the unpopular, unconventional, and unestablished. A typical example of the inevitable abuse is the Papachristou situation here, where the four defendants were obviously arrested and convicted for violating local racial taboos. Another example in the recent records of this Court is *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), which resulted from the vagrancy arrest of a civil rights sit-in demonstrator.

Dealing in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) with legislation vesting comparable discretion in enforcing officers, this Court said:

> "The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' *Cox v. State of Louisiana*, 379 U.S. 536, 559, 579 (Separate opinion of Mr. Justice Black)."

This Court has also held ascertainable standards to be equally important at the courtroom stage. *Giaccio v. Pennsylvania*, 83 U.S. 399 (1966).

In other contexts, this Court has noted that the standardless law "licenses the jury to create its own standard in each case." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937); furnishes a convenient tool for "harsh and discriminatory enforcement by prosecuting officials, against particular groups designed to merit their displeasure," *Thornhill v. Alabama*, 388 U.S. 88, 97-98 (1940); and is "susceptible of sweeping and improper application," and "lends itself to selective enforcement against unpopular causes," *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 435 (1963).

Of particular note is the position taken by the Task Force on the Administration of Justice of the President's Commission on Law Enforcement and Administration of Justice. In commenting on the "wide and largely uncontrollable power extended to the police by the disorderly conduct and vagrancy laws," the Task Force stated:

> "Foremost among its disadvantages is that it constitutes an abandonment of the basic principle upon which the whole system of criminal justice in a democratic community rests, close control over exercise of the authority delegated to officials to employ force and coercion. This control is to be found in carefully defined laws and in judicial and administrative accountability. The looseness of the laws constitutes a charter of authority on the street whenever the police deem it desirable. The practical costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to be the object of these laws the idea that law enforcement is not a regularized, authoritative procedure, but largely a matter of arbitrary behavior by the authorities. The application of these laws often tends to discriminate against the poor and subcultural groups in the population. It is unjust to structure law enforcement in such a way that poverty itself becomes a crime. And it is costly for society when the law arouses the feelings associated with these laws in the ghetto, a sense of persecution and helplessness before official power and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate."
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> *The Courts*, Report of the Task Force on Administration of Justice, the President's Commission on Law Enforcement and Administration of Justice, pp. 103-104 (U.S. Government Printing Office (1967).

Restriction of "Breathing Space"

"A third consequence of the vagueness in the instant legislation is its tendency to inhibit people in the exercise of constitutionally protected liberties. While this consequence is in many respects a combination of the lack-of-notice and lack-of-enforcement-standards problems, it is also a serious problem deserving of independent recognition. This Court has held in dealing with rights of constitutional dignity, especially the high priority, preferred rights, that "government may regulate only with narrow specificity," in order to leave a "breathing space to survive." *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-433 (1963); *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

As will be treated later in this brief, the instant legislation in various ways threatens the right of expression, the right against self-incrimination, the right against unreasonable search and seizure, the right to travel, the right against cruel and unusual punishment, the right to equal protection of the law, and such due process rights as to be arrested only upon probable cause.

USE FOR ARREST AND DETENTION ON SUSPICION ALONE

Ingrained in vagrancy is a tradition of use as a makeweight when law enforcement officers want to arrest someone but can think of no legitimate grounds. This tradition is so pervasive and universally accepted that it has become a virtual substantive engraftment on the vagrancy concept.

Documentation of this tradition is abundant. Immediately illustrative is the attitude of the Assistant City Attorney who represented the City of Jacksonville at the Municipal Court trial in the Papachristou case. Resisting a motion to strike post-arrest statements by the defendants and to dismiss the charge for lack of evidence, he said:

> "Well, talking about vagrants—we're not talking about the commission of a crime. A vagrancy statute is more of a preventative measure . . .". (Papachristou Tr. 39).

Making it plain that the above statement was not the casual misimpression of a young assistant is the following comment by the State Attorney for the Fourth Judicial Circuit of Florida, which includes Jacksonville, during a 1969 televised panel discussion on vagrancy with other law enforcement spokesmen and community representatives:

> "The vagrancy law in Florida is a very broad law that is really a law enforcement tool primarily for temporary detention of suspects. I think [that] is its primary objective.
>
> * * * * *
>
> "I would like to point out that this gentleman over here mentioned that perhaps it should have another name. Perhaps it should have a temporary detention of suspicious persons name or something of that sort."[12]

Highly authoritative confirmation of this tradition is provided by the President's Commission on Law Enforcement and Administration of Justice. The Commission Task Force on the Administration of Justice reported with regard to vagrancy laws that:

> "Their current and widespread use as documented in a number of recent studies, is to afford police justification which otherwise would not be present under prevailing constitutional and statutory limitations, to arrest, search, question, and detain persons because of suspicions that they have committed or may commit a crime. They are also used by the police to clean the streets of undesirables, to harass persons believed to be engaged in crime, and to investigate uncleared offenses."

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[12]Panel discussion on "Feedback," WJCT-TV, Jacksonville, Florida, March 7, 1969.

The Courts, Report of the Task Force on Administration of Justice, the President's Commission on Law Enforcement and Administration of Justice, p. 103 (U.S. Government Printing Office, 1967).

The Task Force on Police echoed these findings. *The Police*, Report of the Task Force on the Police, The President's Commission on Law Enforcement and Administration of Justice, pp. 187-188 (U.S. Government Printing Office, 1967).

The same thing was found by the American Bar Foundation during its Survey of the Administration of Criminal Justice in the United States. See LaFave, *Arrest: The Decision to Take a Suspect into Custody*, pp. 87-89, 354-360 (The Administration of Criminal Justice Series, American Bar Foundation, 1965). Professor LaFave also tells of the "ten day vag. check" by which law enforcement officers obtain the detention of persons for ten days' investigation. In the Jacksonville area, suspicious transients are sometimes sentenced to ten days for vagrancy so that they can be held while an F.B.I. fingerprint check is run to see if they are fugitives from any jurisdiction.[13] See also, Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960); Foote, *Vagrancy-type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. Rev. 102 (1962); Note, *Use of Vagrancy-type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950).

A good example of use of vagrancy solely as an investigative tool was recently before this Court in *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968). A classic example is provided here by the Hugh Brown case.[14]

[13] This statement is based on conversations with municipal judges.

[14] Ironically, because of the State's reliance on vagrancy to support the arrest and heroin-disclosing search of Brown, with attendant probable clause requirements, the heroin was suppressed at Brown's subsequent Criminal Court of Record narcotic prosecution. If the State

This background shows that the instant legislation is shaped and molded by a purpose and history that colors its language and "puts . . . words in [it] as definitively as if it had been so amended by the Legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948). The basic premise underlying the legislation is that the people to whom it will be applied are *per se* suspicious, and the way the legislation is used is the natural result of that premise.

Arrest and detention on suspicion alone are clearly unconstitutional. *Morales v. New York*, 396 U.S. 102 (1969); *Davis v. Mississippi*, 394 U.S. 721 (1969). Conviction on suspicion alone is unthinkable. *In re Winship*, 397 U.S. 358 (1970). The "suspicion only" character of this legislation accordingly renders it facially unconstitutional.

ADDITIONAL RIGHTS AND IMMUNITIES

Constitutional objections in addition to those previously urged in this brief could be raised against the instant legislation. Although meritorious, these objections apply with less force to the parties here and will, therefore, be simply stated without elaboration. They are mentioned largely because their number and variety point up the general inimicability of vagrancy to current principles of social regulation.

Denial of Equal Protection

Many classifications of the instant legislation are arbitrary and discriminatory without any constitutionally redeeming purpose. They accordingly deny equal protection under the law. See e.g., *Rinaldi v. Yeager*, 384 U.S. 305 (1966). Especially invidious is the discrimination against poor and/or unemployed persons both explicit and implicit in the legis-

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had attempted to pursue and develop a stop-and-frisk theory, it might have obtained a deserved conviction. *State v. Brown*, 69-449, Criminal Court of Record for Duval County, Florida.

lation. This Court said in 1941 that "the theory of the Elizabethan poor laws no longer fits the facts." *Edwards v. California*, 314 U.S. 164, 174 (1941). More recently this Court said, "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966). The legislation also invites and promotes abridgement of equal protection by its lack of enforcement standards.

Cruel and Unusual Punishment or Unjust Punishment in Violation of Due Process

To the extent that the legislation makes punishable an involuntary condition or status of life (i.e., poverty or alcoholism) and imposes criminal penalties on status involving no criminality or criminal acts, it provides for cruel and unusual punishment and punishment in violation of due process of law. See *Robinson v. California*, 370 U.S. 660 (1962).

Involuntary Servitude

A cogent argument can be made that a law requiring people to either go to work or go to jail violates the involuntary servitude provisions of the Thirteenth Amendment. See Note, *Vagrancy and Related Offenses*, 4 Harv. Civ. Lib.-Civ. Rights L. Rev. 291 (1960).

Privilege Against Self Incrimination

The self-incrimination problems in the instant legislation result principally from the prohibition against "wandering or strolling around from place to place without any lawful purpose or object." This provision in effect requires a suspected person to give an account of himself. Other provisions of the legislation tend subtly to compel an account. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

Right of Travel and Movement

The prohibitions against vagabonds, night walkers, and wanderers infringe upon the right of travel and movement secured by the Commerce Clause and due process of law. As said in *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964), "the right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law . . .". See also *United States v. Guest*, 383 U.S. 745 (1966); *Kent v. Dulles*, 357 U.S. 116 (1958); and *Edwards v. California*, 314 U.S. 160 (1941).

Double Jeopardy

Penalizing a person for an offense and then penalizing him again for the status resulting from his prior conviction subjects him twice to punishment for the same act or omission.

CONCLUSION

The instant legislation and comparable legislation in other states is flagrantly violative of the Constitution. Any socially valid purpose the concept ever had has expired, and vagrancy has become wholly an instrument of abuse. The abuse, moreover, is widespread. According to the F.B.I.'s Uniform Crime Report for 1969,[15] 106,269 vagrancy arrests were reported by ageneies covering only approximately 144,000,000 of the total American population.

Only an order by this Court striking down the legislation in its entirety can overcome Florida's persistent defense and use of its vagrancy laws. *Smith v. State*, 239 So.2d 250 (Fla. 1970) (Certiorari granted by this Court June 14, 1971); *Johnson v. State*, 202 So.2d 852 (Fla. 1967) and 216 So.2d (Fla. 1968).

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[15] *Crime in the United States, Uniform Crime Reports–1969*, Federal Bureau of Investigation, Table 23. Page 109 (U.S. Government Printing Office 1970).

Petitioners accordingly ask this Court to declare the Jacksonville Vagrancy Ordinance and Florida Vagrancy Statute unconstitutional and to vacate and set aside their convictions and sentences.

Respectfully submitted,

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